Mohd Azhar bin Alkab v Sendereprakasam a/l Subramaniam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-862–07 OF 2020
HAS ZANAH MEHAT, AZIZAH NAWAWI AND SEE MEE CHUN JJCA
1 AUGUST 2022

Contract — Agreement — Sale and purchase agreement — Application by vendor for declaration that sale and purchase agreement null and void, frustrated or deemed terminated — Whether purchaser made payments as required under the sale and purchase agreement — Whether sale and purchase agreement valid and enforceable — Whether sale and purchase agreement frustrated as condition precedent had not been fulfilled — Whether there was oral tenancy agreement in existence — Whether specific performance should be ordered for appellant to be registered as sole owner for the property

The plaintiff ('respondent') had filed a claim against the defendant ('appellant') for a declaration, inter alia, that the sale and purchase agreement dated 16 November 2011 ('SPA') was null and void, frustrated and/or deemed terminated. The SPA was entered into by the respondent as the vendor and the appellant and his late father ('deceased'), as joint purchasers, for the sale and purchase of a double-storey low-cost link house ('property'). The consideration price for the purchase of the property was RM85,000. In respect of the SPA, the appellant and the deceased were represented by Messrs Gopalakrishnan & Co ('the firm'). The property was subject to a restriction of interest whereby prior approval and/or consent from the Perbadanan Kemajuan Negeri Selangor ('PKNS') ought to be obtained before executing any transfer of title to a third party. The respondent had appointed the firm to facilitate his obligation to apply and secure the consent. The property was charged to Malayan Banking Bhd by the respondent for a loan granted to purchase the property from the previous owner ('the Maybank loan'). The appellant moved into the property around July 2002. Consent from PKNS was obtained on 25 October 2003 which was valid for six months. The consent had since lapsed. On 30 September 2014, PKNS agreed to transfer the property to the respondent. On 30 December 2014, the respondent became the registered proprietor of the property. Other than a declaration that the SPA was null and void, the respondent also sought a declaration he was the registered owner of the property, and that the appellant was to deliver vacant possession and pay outstanding and continuing rental. The appellant had counterclaimed essentially for specific performance of the SPA. The High Court judge ('HCJ') allowed the respondent's claim and found that the SPA had lapsed, been frustrated and/or ought to be terminated by reason of the consent having lapsed through no fault of the respondent but due to the conduct of the firm

A engaged by the respondent to carry out the SPA. It was also stated that the SPA was a conditional contract which could not be enforced against the respondent when the condition precedent by virtue of clause of the 1.3 SPA had not been fulfilled. The High Court further held that the appellant's counterclaim for specific performance was defeated by limitation as per s 6(1) of the Limitation
B Act 1953. The final payment was alleged to have been paid on 18 January 2007, on which date the appellant's right to specific performance would have accrued. The action commenced in 2018 and the counterclaim was thus caught by limitation. Hence the present appeal against the decision of the High Court. It was the appellant's submission that once the payment of RM50,000
C had been made, the appellant was allowed to move into the property around July 2002. On the advice and suggestion by the firm, the appellant agreed to pay monthly rental of RM450 to the respondent's Maybank loan as payment of the balance purchase price. The RM16,000 was for rental arrears and other late payments. Since the Maybank loan was settled, the respondent was a bare
D trustee for the property for the benefit of the appellant. The appellant also contended that the: (a) counterclaim was not barred by limitation as the respondent was only registered as the owner on 30 December 2014, when the cause of action arose; (b) SPA was not null and void and/or frustrated as under cl 1.3 of the SPA, as it was the respondent's obligation to apply for the consent;
E and (c) consent having lapsed did not mean the respondent was barred from applying afresh for consent where the respondent did in fact apply on 30 May 2011. Therefore, it could not be said that the SPA was null and void and/or frustrated.

F **Held**, allowing the appeal and counterclaim with costs:

(1) DW1 as the solicitor acting for the appellant had received the payments from the appellant for the settlement of the Maybank loan. DW1 was also acting for the respondent insofar as the settlement of the Maybank
G loan was concerned. He had obtained the Maybank statement for the outstanding amount due on redemption. Further, not only did DW1 confirm to the respondent signing the receipt and reassignment in his presence, he further confirmed the respondent would have due knowledge of the full payment of the Maybank loan. The respondent's
H letter to the firm which confirmed the respondent had received the full payment and the RM16,000 and the receipt and reassignment being signed by the respondent, were not considered by the HCJ. On the totality of the evidence, the court found that the appellant had made full payment of the purchase price of the property (see paras 43, 47, 49 &
I 53).

(2) On the existence of an oral tenancy agreement, the appellant was allowed to move in around July 2002 as he had paid RM50,000 towards the property. There was no issue from the respondent on any rental due and no demand was ever made. In fact, it was upon the advice from the firm

that a rental of RM450 be paid towards the Maybank loan as from August 2005. When the respondent lodged a police report on DW1's conduct, there was no mention of any oral tenancy agreement. There was also an undated letter from the respondent to state he had sold the property and that the purchaser/s were authorised to occupy the property with immediate effect from 25 August 2004. No consideration was given to this letter issued by the respondent (see paras 50–52).

(3) Clause 1.3 of the SPA had in fact been fulfilled except that it had lapsed due to the respondent's non-compliance of the conditions in the consent and was not impossible of performance as the appellant was not prevented from re-applying. The SPA was also not terminated by either party which meant it remained alive such that it could still be performed at any time. Under the circumstances, the SPA was valid and enforceable at all material times (see paras 54 & 59–60).

(4) Limitation had not set in when the appellant filed its counterclaim in response to the respondent's claim. The counterclaim could only have arisen when the respondent was registered as the proprietor of the property on 30 December 2014. Since the appellant had paid all payments due under the SPA, it followed that the order sought by the appellant for the respondent to register the appellant as the sole owner of the property could be granted. Effectively, this meant that at the time of registration, the respondent was a bare trustee for the property (see paras 67–68).

[Bahasa Malaysia summary

Plaintif ('responden') telah memfailkan tuntutan terhadap defendan ('perayu') untuk satu deklarasi, antara lain, bahawa perjanjian jual beli bertarikh 16 November 2011 ('SPA') adalah terbatal dan tidak sah, kecewa dan/atau dianggap ditamatkan. SPA telah dimeterai oleh responden sebagai vendor dan perayu serta arwah bapanya ('si mati'), sebagai pembeli bersama, untuk urusan jual beli rumah kos rendah dua tingkat ('hartanah'). Harga balasan untuk pembelian hartanah tersebut RM85,000. Berkenaan dengan SPA, perayu dan si mati diwakili oleh Tetuan Gopalakrishnan & Co ('firma tersebut'). Hartanah tersebut tertakluk kepada sekatan kepentingan di mana kelulusan dan/atau persetujuan awal daripada Perbadanan Kemajuan Negeri Selangor ('PKNS') perlu diperoleh sebelum melaksanakan sebarang pindah milik kepada pihak ketiga. Responden telah melantik firma tersebut untuk memudahkan obligasinya untuk memohon dan mendapatkan kelulusan. Hartanah tersebut telah digadai kepada Malayan Banking Bhd oleh responden untuk pinjaman yang diberikan untuk membeli hartanah daripada pemilik sebelumnya ('pinjaman Maybank'). Perayu telah berpindah ke rumah tersebut sekitar Julai 2002. Kelulusan daripada PKNS diperoleh pada 25 Oktober 2003 yang sah selama enam bulan. Persetujuan tersebut telah luput. Pada 30 September 2014, PKNS bersetuju untuk memindahkan hartanah tersebut kepada responden.

Pada 30 Disember 2014, responden menjadi pemilik berdaftar hartanah tersebut. Selain daripada deklarasi bahawa SPA adalah terbatal dan tidak sah, responden juga memohon deklarasi bahawa beliau adalah pemilik berdaftar hartanah tersebut, dan bahawa perayu akan menyerahkan milikan kosong dan membayar sewa tertunggak dan berterusan. Perayu telah membuat tuntutan balas pada dasarnya untuk pelaksanaan spesifik SPA. Hakim Mahkamah Tinggi ('HMT') membenarkan tuntutan responden dan mendapati bahawa SPA telah luput, kecewa dan/atau sepatutnya ditamatkan atas sebab persetujuan telah luput bukan kerana kesalahan responden tetapi disebabkan oleh kelakuan firma yang dilantik oleh responden untuk menjalankan SPA. Ia juga menyatakan bahawa SPA adalah kontrak bersyarat yang tidak boleh dikuatkuasakan terhadap responden apabila syarat terdahulu berdasarkan klausa 1.3 SPA tidak dipenuhi. Mahkamah Tinggi seterusnya memutuskan bahawa tuntutan balas perayu untuk pelaksanaan spesifik telah dihalang oleh had sepertimana mengikut s 6(1) Akta Had Masa 1953. Bayaran muktamad didakwa telah dibayar pada 18 Januari 2007, pada tarikh tersebut hak perayu untuk pelaksanaan spesifik akan terakru. Tindakan yang dimulakan pada 2018 dan tuntutan balas tersebut dihalang oleh had masa. Oleh itu rayuan semasa terhadap keputusan Mahkamah Tinggi. Ia adalah menjadi hujahan perayu bahawa sebaik sahaja bayaran RM50,000 dibuat, perayu dibenarkan berpindah ke dalam hartanah tersebut sekitar Julai 2002. Atas nasihat dan cadangan firma, perayu bersetuju membayar sewa bulanan sebanyak RM450 kepada pinjaman Maybank responden sebagai bayaran baki harga belian. RM16,000 adalah untuk tunggakan sewa dan pembayaran lewat lain. Memandangkan pinjaman Maybank telah dijelaskan, responden adalah pemegang amanah biasa bagi hartanah tersebut untuk kepentingan perayu. Perayu juga berhujah bahawa: (a) tuntutan balas tidak dihalang oleh had kerana responden hanya didaftarkan sebagai pemilik pada 30 Disember 2014, apabila kausa tindakan timbul; (b) SPA tidak terbatal dan sah dan/atau kecewa seperti di bawah fasal 1.3 SPA, kerana ia adalah kewajipan responden untuk memohon kelulusan; dan (c) kelulusan telah luput tidak bermakna responden telah dihalang daripada memohon semula untuk mendapatkan kelulusan di mana responden sebenarnya telah memohon pada 30 Mei 2011. Oleh itu, tidak boleh dikatakan bahawa SPA adalah batal dan tidak sah dan/atau kecewa.

Diputuskan, membenarkan rayuan dan tuntutan balas dengan kos:

(1) DW1 sebagai peguamcara yang bertindak bagi perayu telah menerima bayaran daripada perayu untuk penyelesaian pinjaman Maybank. DW1 juga bertindak untuk responden setakat penyelesaian pinjaman Maybank berkenaan. Beliau telah mendapatkan penyata Maybank untuk jumlah tertunggak yang perlu dibayar semasa penebusan. Selanjutnya, bukan sahaja DW1 mengesahkan kepada responden yang menandatangani resit dan penyerahan semula hak di hadapannya, beliau seterusnya mengesahkan responden mempunyai pengetahuan yang

sewajarnya mengenai pembayaran penuh pinjaman Maybank. Surat responden kepada firma yang mengesahkan responden telah menerima bayaran penuh dan RM16,000 serta resit dan penyerahan semula hak yang ditandatangani oleh responden, tidak dipertimbangkan oleh HMT. Mengenai keseluruhan keterangan, mahkamah mendapati perayu telah membuat bayaran penuh bagi harga belian hartanah tersebut (lihat perenggan 43, 47, 49 & 53).

(2) Atas kewujudan perjanjian penyewaan lisan, perayu dibenarkan berpindah pada sekitar Julai 2002 kerana beliau telah membayar RM50,000 ke atas hartanah tersebut. Tiada isu daripada responden mengenai sebarang sewa yang perlu dibayar dan tiada permintaan dibuat. Malah, ia adalah atas nasihat firma tersebut bahawa sewa RM450 dibayar ke atas pinjaman Maybank mulai Ogos 2005. Apabila responden membuat laporan polis mengenai kelakuan DW1, tidak ada menyebut sebarang perjanjian penyewaan lisan. Terdapat juga surat tidak bertarikh daripada responden menyatakan beliau telah menjual hartanah tersebut dan pembeli diberi kuasa untuk menduduki hartanah tersebut berkuatkuasa serta-merta mulai 25 Ogos 2004. Tiada balasan diberikan kepada surat yang dikeluarkan oleh responden ini (lihat perenggan 50–52).

(3) Klausa 1.3 SPA sebenarnya telah dipenuhi kecuali ia telah luput kerana responden tidak mematuhi syarat-syarat dalam persetujuan dan adalah tidak mustahil untuk dilaksanakan kerana perayu tidak dihalang daripada memohon semula. SPA juga tidak ditamatkan oleh mana-mana pihak yang bermakna ia kekal wujud dan masih boleh dilaksanakan pada bila-bila masa. Dalam keadaan tersebut, SPA adalah sah dan boleh dikuatkuasakan pada setiap masa yang penting (lihat perenggan 54 & 59–60).

(4) Had belum ditetapkan apabila perayu memfailkan tuntutan balasnya sebagai tindak balas kepada tuntutan responden. Tuntutan balas hanya boleh timbul apabila responden didaftarkan sebagai pemilik hartanah pada 30 Disember 2014. Memandangkan perayu telah membayar semua bayaran yang perlu dibayar di bawah SPA, ia berikutan perintah yang dimohon oleh perayu bagi responden untuk mendaftarkan perayu sebagai pemilik tunggal hartanah tersebut boleh diberikan. Kesannya, ini bermakna bahawa pada masa pendaftaran, responden adalah pemegang amanah biasa untuk hartanah tersebut (lihat perenggan 67–68).]

Cases referred to

Bulyah Ishak & Anor v Ambank (M) Bhd and another appeal [2018] 1 MLJ 484; [2018] 3 CLJ 478, CA (refd)

Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24, CA (refd)

National Land Finance Cooperative Society v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (distd)
Penang Development Corporation v Khaw Chin Boo & Anor [1993] 2 MLJ 161; [1993] 3 CLJ 167, HC (refd)
Sime Hok Sdn Bhd v Sim Poh Sheng [2013] 2 MLJ 149; [2013] 2 CLJ 615, FC (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614; [1994] 3 CLJ 20, SC (refd)

Legislation referred to

Contracts Act 1950 ss 33, 33(b), 38
Limitation Act 1953 s 6(1)

Appeal from: Civil Suit No BA-22NCVC-553–11 of 2018 (High Court, Shah Alam)

R Thayalan (with Ambbi Sundrambal Balakrishnan) (Manjet & Partners) for the appellant.
Daya Nair (with S Thilaga) (S Thilaga) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] The respondent/plaintiff had filed a claim against the appellant/defendant for a declaration, inter alia, that the sale and purchase agreement dated 16 November 2001 ('SPA') was null and void, frustrated and/or deemed terminated. The SPA was entered into by the respondent as the vendor and the appellant and his late father ('deceased'), as joint purchasers, for the sale and purchase of a double storey low cost link house in Taman Medan, Selangor ('the property').

[2] The High Court judge ('HCJ') allowed the claim. We allowed the appellant's appeal for the reasons as follows.

BACKGROUND FACTS

[3] The consideration price for the purchase of the property was RM85,000. In respect of the SPA, the appellant and the deceased were represented by Messrs Gopalakrishnan & Co ('the firm').

[4] The property is subject to a restriction of interest whereby prior approval and/or consent from the *Perbadanan Kemajuan Negeri Selangor* ('PKNS') ought to be obtained before executing any transfer of title to a third party. The

respondent had appointed the firm to facilitate his obligation to apply and secure the consent. A

[5] The property was charged to Malayan Banking Bhd by the respondent for a loan ('Maybank loan') granted to purchase the property from the previous owner, known as Yayathy a/I Peru mal. B

[6] The appellant moved into the property around July 2002. The reason the appellant moved in, is disputed.

C

[7] It is undisputed that upon execution of the SPA, a sum of RM8,500 was paid to the respondent as the 10% deposit.

[8] It is also not disputed that consent from PKNS was obtained on 25 October 2003 which was valid for six months. The consent has since lapsed. D

[9] On 30 September 2014, PKNS agreed to transfer the property to the respondent. On 30 December 2014, the respondent became the registered proprietor of the property.

E

[10] Other than the declaration the SPA is null and void, the respondent also seeks a declaration he is the registered owner of the property, the appellant is to deliver vacant possession and pay outstanding and continuing rental. The appellant has counterclaimed essentially for specific performance of the SPA. F

DECISION OF THE HCJ

[11] The HCJ found that the SPA had lapsed, been frustrated and/or ought to be terminated by reason of the consent having lapsed through no fault of the respondent but due to the conduct of the firm engaged by the respondent to carry out the SPA. G

[12] It was also stated that the SPA was a conditional contract which cannot be enforced against the respondent when the condition precedent by virtue of cl 1.3 SPA had not been fulfilled. Reference was made to s 33 Contracts Act 1950 ('the CA') and *National Land Finance Cooperative Society v Sharidal Sdn Bhd* [1983] 2 MLJ 211. *National Land Finance Co-operative Society* essentially held that a contingent contract shall not take effect until and unless the condition is fulfilled and since the consent of the Foreign Investment Committee ('FIC') had been refused, the contingent event became void in accordance with s 33(b) of the CA. H I

[13] There was ample evidence that the firm delayed submission of the

consent which was done two years after SPA was signed and no explanation for the delay was given.

[14] The consent was valid for six months from 25 October 2003 and lapsed on 24 April 2004. There was no evidence that the validity of the consent was extended or that any fresh application was made. This meant that the alternative argument that even if the SPA was binding and the consent had lapsed, the SPA is deemed terminated by effluxion of time and impossibility of performance.

[15] The respondent was the registered owner of the property where the appellant's case was that the balance purchase price had been paid to the firm such that the property ought to be transferred to the appellant. However there was no evidence that the money had been received by the respondent. The proprietary rights of the respondent remained with the respondent where the appellant was a mere tenant holding over.

[16] The HCJ further found that there was an oral agreement for tenancy where the rental is to be paid towards reduction of the Maybank loan. The tenancy took effect in 2002.

[17] The appellant's counterclaim for specific performance was defeated by limitation as per s 6(1) of the Limitation Act 1953. The final payment was alleged to have been paid on 18 January 2007, on which date the appellant's right to specific performance would have accrued. The action commenced in 2018 and the counterclaim is thus caught by limitation.

SUBMISSIONS OF THE APPELLANT

[18] It was submitted by the counsel for the appellant that the appellant had paid the following sums to the respondent and/or the firm as follows:

(a) RM41,500 was paid on 25 September 2001;

(b) deposit sum of RM8,500 was paid upon execution of the SPA;

(c) RM31,500 was paid on 5 July 2006;

(d) RM16,000 was paid on 18 January 2007; and

(e) rental fee of RM450 from August 2005 till July 2006 amounting to RM5,400.

[19] Once the payment of RM50,000 had been made, the appellant was allowed to move into the property around July 2002. On the advice and suggestion by the firm, the appellant agreed to pay monthly rental of RM450

to the respondent's Maybank loan as payment of the balance purchase price. The RM16,000 was for rental arrears and other late payment.

[20] It is the duty of the respondent, as the vendor of the property to secure the consent; the respondent has authorised the firm to act on his behalf to settle the Maybank loan which was duly done; and therefore the appellant has duly complied with the obligation under the SPA.

[21] Since the Maybank loan was settled, the respondent was a bare trustee for the property for the benefit of the appellant.

[22] The counterclaim is not barred by limitation as the respondent was only registered as the owner on 30 December 2014. This is when the cause of action arises.

[23] The SPA is not null and void and/or frustrated as under cl 1.3 SPA, it is the respondent's obligation to apply for the consent. It has been agreed that if the consent is not obtained within the first completion date, either party shall be entitled to terminate the SPA by written notice. As 'the first completion date' has not been defined, it cannot mean 'a reasonable time'. This is because the respondent had gained an advantage by getting the appellant to settle the Maybank loan and did not apply for the consent and shifted the blame to the firm and the appellant. Section 38 of the CA refers.

[24] The consent having lapsed did not mean the respondent is barred from applying a new application for consent where the respondent did in fact applied on 30 May 2011. Therefore it cannot be said the SPA is null and void and/or frustrated.

[25] *National Land Finance Co-operative Society* can be distinguished on the facts where FIC approval was a contingent event. Here the respondent has already obtained the consent to transfer subject to the respondent's obligations to fulfil the stipulated requirement within six months which it failed to do so. The respondent was never prevented from applying for a fresh consent. This event was not an impossible event under s 33(b) of the CA.

[26] The respondent is estopped by conduct. Here, he has requested the appellant to settle the Maybank loan where it was agreed that such payments will be taken into account for the balance purchase price. This also gave rise to unjust enrichment.

[27] The respondent's evidence was unreliable in relation to the receipt and reassignment document where he testified to signing it and then saying it was

not his signature. The respondent had also signed a letter dated 18 January 2007 and another undated letter which stated he had received full payment and RM16,000 and he was allowing the appellant to occupy the property from 25 August 2004.

SUBMISSIONS OF THE RESPONDENT

[28] It was contended the SPA is no longer enforceable as:

(a) the SPA was conditional upon the respondent obtaining the consent to transfer/sell the property;

(b) the consent was secured on 25 October 2003 and as its validity was limited for a period of six months hence had lapsed by the 24 April 2004; and

(c) no evidence was led to establish that the validity period of the consent had been extended or renewed.

[29] There was no express time to secure the consent where time is not at large but to be fulfilled within a reasonable time. Reference was made to *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24.

[30] The alternative argument was that there was impossibility of performance and effluxion of time. Here, DW1 from the firm while stating a delay of 17 years to complete the SPA is not unreasonable had at the same time agreed the SPA is now impossible of performance. There was an unexplained delay on the part of the firm to complete the transaction. The respondent cannot be held responsible for the manner in which the firm chose to conduct the transaction nor can he held liable for his obligation to secure the consent as that was entrusted entirely to the firm.

[31] The claim for rental was on the basis of an oral tenancy agreement.

[32] With regard to bare trust, the appellant has not proved the payment of the full purchase price or that the respondent has received the balance purchase price. The settlement of the Maybank loan by the appellant has also not been proved. The HCJ had found the signature on the Receipt and Reassignment was not that of the respondent; that the respondent had no knowledge of the payments and who made them and the firm never kept the respondent informed of such payments.

[33] The counterclaim was a non-starter as there was no proof of payments and any payment was made to the firm and not to the respondent. Limitation had also set in where the last payment was made on 18 January 2007 and the

counterclaim was filed on 12 December 2018. Laches also applied where the appellant did nothing to seek the equitable remedy of specific performance of the SPA.

OUR DECISION

Payment of purchase price

[34] We will first consider whether the appellant had made the payments as required under the SPA. It is not disputed that the deposit of RM8,500 has been paid by the appellant upon the execution of the SPA. This is reflected in Item F where the deposit is stated to be RM8,500 and cl 1.2 where the deposit shall be paid forthwith upon execution of the SPA.

[35] It is the appellant's position that apart from the deposit, he paid RM41,500 on 25 September 2001, RM31,500 on 5 July 2006, RM16,000 on 18 December 2007 and rental of RM450 from August 2005 till July 2006 amounting to RM5,400.

[36] The payment of RM41,500 was admitted by DW1 during cross examination (encl 49/67–71) and supported by a receipt dated 25 September 2001 issued by the firm to the appellant (encl 8/93). This showed that the firm had received the said sum towards the payment of the property. This effectively turned out as a redemption of the property.

[37] The payment of RM31,500 on 5 July 2006 was supported by a receipt dated 5 July 2006 issued by the firm to the appellant (encl 50/39). This showed that the firm had received the said sum towards the payment of the property. This too effectively turned out as a redemption of the property.

[38] Both the payments were towards the settlement of the Maybank loan. It is not disputed the respondent had taken a loan to purchase the property from the previous proprietor. By letter dated 17 August 2005 (encl 50/37), the firm had duly informed the appellant of the need to settle the differential sum. The firm thereupon obtained the bank statement dated 29 August 2005 as to the outstanding differential amount which showed the amount to be RM82,412.48 (encl 50/25). This amount was confirmed by PW2, the Maybank officer (encl 48/9495).

[39] The earlier payment of RM41,500 would also be directed to the settlement of the Maybank loan. This can be confirmed by the bank statements issued by Maybank on 29 August 2005 for an outstanding amount of RM82,412.48 and dated 21 August 2006 (encl 50/26) which showed a balance

of RM44.568.15. There was therefore a reduction of RM37,844.33 on the current balance amount due and owing under the Maybank loan.

[40] Upon the respondent's request for rental arrears and other late payment charges in end 2006, the appellant made a payment of RM16,000. This can be seen in the respondent's own letter dated 18 December 2007 to the firm (encl 50/53) confirming he had received RM16,000 from DW1 being arrears in rental and other late payment dues.

[41] On the payment of rental of RM450 from August 2005 till July 2006 amounting to RM5,400, the evidence of the appellant is that since he had paid RM50,000, he was allowed to move into the property around July 2002. This evidence is credible since we had earlier found that there were two payments of the deposit of RM8,500 and RM41,500 by the date of execution of the SPA. It was upon the advice from the firm that a rental of RM450 be paid towards the Maybank loan as from August 2005. Refer to the letter from the firm dated 7 August 2005 to the appellant (encl 50/33–34).

[42] The HCJ stated in paras 43–44 of the grounds of judgment (encl 48) as follows:

> [43] The evidence of DW1 who managed the said solicitors firm failed to proved that the payments by the deceased to complete the SPA had been received by Plaintiff or that he had notice of the moneys paid to account of the SPA or towards settlement of his MBB housing loan account.
>
> [44] It is noteworthy that the very basis of the Defendant's case in seeking title and interest in the subject property was not supported by evidence of full settlement of the purchase price. The Defendant or the deceased paid the balance purchase price to the Firm and not to the Plaintiff. DW1 conceded during cross-examination that the balance purchase price was not released to the Plaintiff. Hence, as the deposit of RM8,500.00 which he admitted receiving, and any amount paid by the Defendant towards the redemption of the Maybank Loan (which remains to be proved) cannot in law confer proprietary interest in the Property to the Defendant.

[43] We find the above to be in error as DW1 as the solicitor acting for the appellant as the purchaser had received the payments from the appellant for the settlement of the Maybank loan. DW1 was also acting for the respondent insofar as the settlement of the Maybank loan was concerned. He had obtained the Maybank statement for the outstanding amount due on redemption. Receipts had been issued by the firm that the moneys were received from the appellant towards the settlement of the Maybank loan. The respondent had in fact confirmed such settlement except that the respondent had no knowledge of the payments and who made them and the firm never kept the respondent informed of such payments. The payment of RM16,000 and RM4,500 were supported by the letters from DW1.

[44] Over and above that, there was the letter from the respondent himself dated 18 January 2007 to the firm which we had referred to earlier. That letter states as follows:

> I hereby confirm that I have received the full payment in respect of the above mentioned property from the above named purchasers; vide Agreement dated 10/01/2001 and have executed and signed all the necessary documents in respect of the above mentioned property.
>
> Further I wish to confirm that I have receive a sum of Sixteen Thousand (RM16,000.00) being arrears in rental and other late payment dues from Mr. Gopalakrishnan @ Muniandy, in respect of the above mentioned property.
>
> As such I hereby confirm that I have no any further claims towards the property or the Purchasers in respect of the above mention property.

[45] This letter effectively confirmed the respondent had received the full payment and the RM16,000. The respondent's position was that it was not his signature and the signature is not similar to his other signatures in other documents referred to during cross examination such as his police report and letter to Maybank for documents to be released to his solicitor (encl 48/228). However, there was no police report made on this (encl 48/330).

[46] There was also the receipt and reassignment (encl 50/5660) which the respondent initially confirmed to having signed (encl 48/209). When further cross-examined, he reversed course that the signature was not his. Refer to encl 48/213 lines 31–35 and 214/lines 1–3. This is to be contrasted to DW1's evidence that the respondent had executed the receipt and reassignment in his presence (encl 49/43–44). His evidence subsequently in encl 49/44 lines 19–37 and 45 lines 1–12 was as follows:

> ASB It was executed before you?
>
> GOPAL Yes, yes
>
> ASB You confirmed that this is their signatures Sir?
>
> GOPAL Yes.
>
> ASB It is, Sir, since this document, receipt and reassignment has been dated 09.07.2009, can we say that at least Mr Sendereprakasam and Mr Guna Seelan would have put down their signature here, the latest will be 9*th* July. Can you agree?
>
> GOPAL Yes, yes.
>
> ASB 2009. If that's the case Sir, would Mr Sendereprakasam have the due knowledge with regard to this full payment of his loan.
>
> GOPAL Yes.
>
> ASB In the year 2009?
>
> GOPAL Yes.
>
> ASB He must have

GOPAL He must have

ASB Yes or no Sir?

GOPAL Yes, yes.

[47] Hence, not only did DW1 confirm to the respondent signing the receipt and reassignment in his presence, he further confirmed the respondent would have due knowledge of the full payment of the Maybank loan.

[48] The original documents pertaining to the Maybank loan were released to the firm on 22 December 2008 (encl 50/49). It is a fact that upon settlement of a finance loan, such original documents deposited with the financiers will be released to the borrower for the purpose of discharge of charge and registration under the borrower's name.

[49] We find that the respondent's letter dated 18 January 2007 to the firm which confirmed the respondent had received the full payment and the RM16,000 and the receipt and reassignment being signed by the respondent, were not considered by the HCJ.

Whether oral tenancy

[50] On the existence of an oral tenancy agreement, we had earlier found the appellant was allowed to move in around July 2002 as he had paid RM50,000 towards the property. There was no issue from the respondent on any rental due and no demand was ever made. In fact, It was upon the advice from the firm by letter dated 7 August 2005 that a rental of RM450 be paid towards the Maybank loan as from August 2005. When the respondent lodged a police report dated 9 July 2006 on DW1's conduct, there was no mention of any oral tenancy agreement. Refer to encl 50/76:

> ... Pada 31.07.2002 En. Muniandy memberitahu saya bahawa segala urusan penjualan rumah tersebut telah selesai dan dia menyuruh saya memberi kunci kepada pembeli tersebut dan memberitahu saya akan mendapat surat daripada bank.

[51] There was also an undated letter (encl 50/24) from the respondent to state he had sold the property and that the purchaser/s were authorised to occupy the property with immediate effect from 25 August 2004. That letter reads as follows:

> I have sold the above mentioned property by way of Sale & Purchase Agreement dated 10/11/2001.
>
> Further I hereby authorize and confirm the above named Purchasers to fully occupy the above mentioned property with immediate effect from 25/08/2004.

[52] The evidence of the respondent was that it was not his letter and that the signature was similar to his police report (encl 48/221). He had not lodged any police report on the forgery (encl 48/224). We find that no consideration was given to this letter issued by the respondent.

[53] On the totality of the evidence, we find that the appellant had made full payment of the purchase price of the property which included RM16,000 and the rental sum of RM4,500. The payments of RM41,500 and RM31,500 had gone towards the redemption of the property. The appellant was also allowed to move in to the property on the basis of having paid RM50,000 towards the purchase price.

[54] Under the circumstances, the SPA is valid and enforceable at all material times. On this point alone, the appeal is allowed.

CONTINGENT CONTRACT

[55] For completeness we deal with the issue of contingent contact. Here, the HCJ found the SPA was a conditional contract which cannot be enforced against the respondent when the condition precedent by virtue of cl 1.3 SPA had not been fulfilled and had become frustrated and an impossible condition to be fulfilled.

[56] Item H (Completion Date) of the Schedule to SPA provides that the balance sum is to be paid by within 90 days from the date of receipt of the written consent from the developer/vendor/proprietor. Clauses 13 and 2.1 and 4B then set out the following:

> 1.3 This Agreement is subject to the Vendor(s) obtaining the Developer's written consent for the sale and accordingly the Vendor(s) shall immediately upon the execution of this Agreement apply to the Developer for the said written consent. If such consent is not obtained by the first compietion date either party hereto shall be entitled to forthwith upon notice to the other party terminate this Agreement and upon such termination neither party shall have any claims against the other in respect of the said property or under the said Agreement and Assignment and this Agreement and the Vendor(s) shall forthwith refund the said Deposit in full free of interest to the Purchaser(s).
>
> 2.1 The Balance Sum in Item G of the Schedule hereto shall be paid on the Completion Date stated in Item H of the Schedule hereto to the Vendor(s) Solicitors as stakeholder. If the Completion Date falls on a Sunday or a public holiday completion shall take place on such other day as may be agreed by the parties or in default of such agreement on the day other than a Sunday or public holiday next following the Completion Date.
>
> 4(B). Non-Completion by the Vendor
>
> If by reason of the Vendor's breach of this Agreement (without any prior breach

A by the Purchaser of this Agreement or any prior rescission of this Agreement), the Purchaser shall be entitled, at his option to either of the following and in either case:-

(i) To specific performance of this Agreement and the sale hereunder by the Vendor of the said Property; or

B

(ii) To rescind this Agreement by a notice in writing served on the Vendor or the Vendor's Solicitors. ...

(iii) Upon termination of this Agreement neither the Vendor, their heirs, estates, persons deriving title thereunder shall have any claim against the Purchaser in respect of this Agreement.

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[57] Clause 1.3 is clear that the obligation to obtain PKNS's consent is at all times with the respondent. It is undisputed that the respondent had appointed the firm to facilitate his obligation to apply and secure the consent. On 25 October 2003, PKNS gave the said consent (encl 50/27). Paragraph 4 states as follows:

D

4. Tuan/puan dikehendaki menguruskan 'Deed of Reassignment' dan menandatangani Surat Ikatan Penyerahan Hak ('Deed of Assignment-by way of transfer') dalam tempoh enam (6) bulan dari tarikh surat ini dengan peguam PKNS atau peguam tuan/puan. Jika tuan/puan tidak berbuat demikian maka kelulusan ini akan terbatal dengan sendirinya.

E

[58] It is not in dispute that the consent lapsed on 24 April 2004 when the condition in the aforesaid para 4 was not complied with. Clause 1.3 also states that if such consent is not obtained by the first completion date, either party shall be entitled to terminate upon notice. Here, neither party had exercised the option to terminate. We accepted the evidence that in the meantime, the appellant had made the various payments leading to the settlement of the Maybank loan.

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[59] The consent only stated in the event of non-compliance, the approval will be 'terbatal'. It did not prohibit the respondent from reapplying. This was borne out by the respondent re-applying on 30 May 2011. Hence cl 1.3 had in fact been fulfilled except that it had lapsed due to the respondent's non-compliance of the conditions in the consent and was not impossible of performance as the appellant was not prevented from re-applying. *National Land Finance Co-operative Society* can therefore be distinguished on the facts where FC approval was a contingent event.

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[60] The SPA was also not terminated by either party which meant it remained alive such that it could still be performed at any time.

[61] We are of the considered opinion that the factual matrix of this case as

set out above would render ss 38 and 40 of the CA applicable. The aforesaid provisions state the following:

> 38 Obligations of parties to contracts
>
> (1) The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.
>
> (2) Promises bind the representatives of the promisors in case of the death of the promisors before performance, unless a contrary intention appears from the contract.
>
> 40 Effect of refusal of party to perform promise wholly
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirely, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[62] In *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161; [1993] 3 CLJ 167, it was said at p 163 (MLJ); 168 (CLJ):

> First, it is common ground that the written agreement did not fix any time for the performance of the contract. So when no time is specified, the contract must be performed within a reasonable time, s 47 of the Contract Act 1950. What is 'a reasonable time', is, in each particular case, a question of fact (ibid). However, the plaintiffs cannot arbitrarily fix the time. It must be reasonable having regard to the state of things at the time when notice was given. ...

[63] On reasonable time for performance this was said in *Sime Hok Sdn Bhd v Sim Poh Sheng* [2013] 2 MLJ 149 at p 169; [2013] 2 CLJ 615 at pp 637–638:

> [31] On reasonable time for performance, in *Ellis v Thompson*, 3 M & W445 Alderson, B, said that:
>
> > The correct mode of ascertaining what reasonable time is in such a case is by placing the Court and Jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made and under which the contract took place. By so doing you enable the Court and Jury to form a safer conclusion as to what is the reasonable time which the law implies and within which the contract is to be performed.
>
> *Leake on contracts*, p 200:
>
> > Under a written contract for the sale of goods appointing the time for payment, but silent as to the time for delivery; and, therefore, presumptively importing delivery within a reasonable time upon credit, evidence was held admissible of a usage in the trade, that the delivery should be made concurrently with the payment and could not be demanded before, Field v. Lelean, 6 H & N 617,

distinguishing or overruling Spartali v. Benecke, 10 CB 212.

[64] The HCJ had accepted the proposition stated in *Jaafar bin Ibrahim* at p 26 that:

> ... From the evidence of the parties ... should be construed as a conditional contract or contract subject to contingency, i.e. conditional on, or contingent on the approval of the application by the specified date. What then would be the position of such a contract in regard to the equitable rule that time shall not be the essence of a contract unless there is contrary intention by express words, or from the nature of the transaction or from surrounding circumstances? In this connection, one cannot ignore the Privy Council case of Aberfoyle Plantation Ltd. V Khaw Bian Cheng. The ratio decidendi of that case is that a conditional contract or a contingent contract (i.e. the expression used in our Contracts Act, 1950), is wholly excluded from the operation of that equitable principle aforesaid. Lord Jenkins delivering the opinion of the Board, laid down the following special principles as applicable to a conditional contract:
>
> (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date;
>
> (ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;
>
> (iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

[65] It was held that the effect of an omission to prescribe the time to obtain consent is not to render time to be at large. However that case also stated where no time is fixed, the condition must be fulfilled within a reasonable time. This is where the notion of reasonable time as referred to in *Penang Development Corporation* and *Sime Hok Sdn Bhd* comes in.

[66] We noted the argument that all in all, there would be a delay of 17 years to complete the SPA; that the consent had lapsed due to no fault of the respondent but the conduct of the firm and the firm only informed the respondent of the consent two years after it had been obtained. This cannot negate the requirement of cl 1.3 that it was the respondent's obligation at all times to secure the consent, that the firm was appointed by the respondent to secure the consent and that neither party had exercised the option to terminate.

Counterclaim

[67] Limitation had not set in when the appellant filed its counterclaim in response to the respondent's claim. We find the counterclaim could only have

arisen when the respondent was registered as the proprietor of the property on 30 December 2014. A

[68] We specifically refer to prayer 50(b) of the counterclaim which seeks an order against the respondent to register the appellant as sole owner for the property. Since the appellant had paid all payments due under the SPA, it follows that this order can be granted. Effectively, this meant that at the time of registration, the respondent was a bare trustee for the property. Reference may be made to *Bulyah Ishak & Anor v Ambank (M) Bhd and another appeal* [2018] 1 MLJ 484; [2018] 3 CLJ 478 where this court stated at p 500 (MLJ); 494 (CLJ): B C

> [42] The plaintiffs argued as the learned judge had ruled that the deceased is the rightful owner of the property as he had paid the full purchase price, the first defendant is merely holding the said property as a 'bare trustee' to the deceased. In view of this, the learned judge ought to have made a finding that the plaintiffs' case against the fourth defendant ought to be allowed. D
>
> [43] We found merit in this argument. After having made the findings the full price for the said property had been paid, the first defendant stood in the position of a 'bare trustee' to the deceased. As a 'bare trustee', the first defendant could not deal with the property or treat as if the property belong to him. Further, in this case, an irrevocable power of attorney had been executed. Clause 4 of exh P2 states that the deceased had the sole right to deal with the property. In view of the aforesaid, the transaction entered into by the first defendant and the fourth defendant for the purpose of the financing facilities is void ab initio. Hence, the learned judge ought not to have dismissed the plaintiffs case against the fourth defendant. Obviously, His Lordship's decision to dismiss the plaintiffs' claim and allow the fourth defendant to proceed with the order for sale of the property went against the principle enunciated in Kamarulzaman and Samuel Naik. From the cases cited herein, a vendor who is a 'bare trustee' has no beneficial interest in the property. Therefore, the said vendor is not authorised by law to sell, transfer or deal with the property to the new purchaser or holder of any interest in the land. There is sufficient evidence before us that the first plaintiff had taken possession of the property and had been paying quit rents and assessment bills to the proper authorities (see para. 20(f) of this grounds of judgement). E F G
>
> [44] Learned counsel for the plaintiffs had referred us to the Supreme Court case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 where it was held that 'When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser' ... H

[69] In *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 referred to in *Bulyah*, it was said at p 624 (MLJ); 26 (CLJ) that: I

> it is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has

a lien on the land. Please see *Lysaght v Edwards* [1976] 2 ChD 499 and this case was cited with approval very often in our courts eg by the Federal Court in *Intercontinental Miners Sdn Bhd v Society Des Etains De Banjas Tudgu* [1974] 1 MLJ 145 and *Temenggong Securities Ltd v Registrar of Titles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee ie unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam v Tham Kong* [1980] 2 MLJ 159, PC that 'the Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.

CONCLUSION

[70] For the reasons given above, we allowed the appeal and set aside the decision of the HCJ. The appellant's counterclaim was allowed. Costs of RM30,000 here and below, was allowed, subject to allocatur.

Appellant's appeal and counterclaim allowed with costs; decision of the High Court set aside.

Reported by K Selvaraju